BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL A. CARDOZA	)	
Claimant	)	
V.	)	
	)	Docket No. 1,070,341
FOODBRANDS SUPPLY CHAIN SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
TYSON PREPARED FOODS, INC.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the July 16, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden.

APPEARANCES

Peter Jouras, of Fairway, Kansas, appeared for the claimant. Gregory D. Worth, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from July 15, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant met his burden of proving he sustained bilateral carpal tunnel and bilateral cubital tunnel syndromes from repetitive trauma arising out of and in the course of his employment with respondent, but denied benefits after finding claimant failed to provide timely notice of injury to respondent. The ALJ determined the date of accident to be May 14, 2014, for this repetitive injury claim.

Claimant appeals, arguing the ALJ erred in determining proper timely notice was not given. Claimant also raises constitutional issues over which he admits the Board has no jurisdiction. Claimant contends the ALJ's Order should be reversed because he did not

know his medical condition was related to his employment until June 6, 2014, and therefore was physically unable to provide notice to respondent within ten days of his last day of work. Additionally, claimant argues the string of amendments to the Workers Compensation Act has resulted in a violation of claimant's due process rights as the *quid pro quo* of the original Act no longer constitutes an adequate and sufficient substitute for abrogating an employee's right to benefits.

Finally, claimant contends he did not have actual knowledge of his condition until after the 10-day deadline had expired, but, within 3 days of receiving such knowledge he notified respondent of his claim. Therefore, due process requires tolling of the notice provision until a claimant learns he had a basis for making a claim.

Respondent contends the ALJ's Order should be affirmed, as claimant failed to provide timely notice of his alleged accidental injury and neither of the two exceptions to the notice rule raised by claimant apply in this instance.

FINDINGS OF FACT

Claimant worked for respondent from 2010 to 2014 as freezer cleaner. His job duties were to sweep the floors in the refrigerated and freezer warehouses and to pick up trash. He had a one cubic yard cart that he pushed and filled with pieces of wood, paper and plastic that had spilled onto the ground. Claimant also had other duties assigned to him by the supervisor. Claimant worked 40 hours a week using his hands and wrists. He used a dustpan and a regular house broom to sweep. He worked three 11 hour and 15 minute days and one 6 hour and 15 minute day to reach 40 hours. The job required repetitive motion.

Claimant denies problems with his forearms and hands prior to doing this job. He testified the first time he felt pain in his hands or arms was on July 13, 2013, when he tried to dump his cart and some pieces of wood would not come out, so he jerked the cart. As he did so, a couple of times, he felt a jolt of electricity shoot down into his left hand and into his ring finger. He felt tingling at the same time. Claimant indicated he reported this incident to the supervisor on duty at the time and an incident report was filled out. Then, either the same day or the next, claimant met with the nurse who gave claimant Tylenol and a cold pack to use for 20 minutes, every couple of hours, for a couple of days, followed by alternating cold and hot packs for a few days. Claimant was not sent to a doctor and he did not seek any additional treatment.

Claimant testified that shortly after the incident, the pain and tingling started occurring at night and on other occasions at work, but he did not fill out another incident report. Claimant testified he did not fill out any more incident reports because a nurse named Misty Armstrong told him that if he had too many incident reports she would have to send him to the company doctor and he would be terminated. Claimant's wife testified she was present for this conversation. Claimant described several incidents where he was

injured on-the-job and where the nurse and a supervisor would convince him not to file a report, or would have him fill out the report in such a way the injury would not be considered work-related. These incidents involved unrelated back and shoulder injuries.

Claimant eventually sought medical care with his primary care physician, Dr. Ahmed Baig, but claimant's concerns were dismissed as nothing more than arthritis. Later, Dr. Baig recommended claimant be assigned an eight-hour a day desk job due to claimant's blood pressure and stress at work. This recommendation was prior to, and unrelated to, the carpal tunnel and cubital tunnel diagnoses, and led to claimant's decision to terminate his employment with respondent.

Claimant first met with Ferilyn Shi, M.D., a neurologist, for evaluation on June 4, 2014, with complaints of numbness and tingling in his hands and arms, tingling in his toes and memory loss. Claimant reported having these symptoms for about a year, with worsening over the last two months. Dr. Shi examined claimant and diagnosed bilateral carpal tunnel syndrome, osteoarthritis, degenerative arthritis of the spine, memory loss, and sleep deprivation. Claimant was started on Neurontin for the carpal tunnel and was provided with wrist splints. Dr. Shi also referred claimant to Dr. Appelbaum for tests.

On June 6, 2014, claimant met with James Appelbaum, M.D., for follow-up on the carpal tunnel syndrome diagnosis. Dr. Appelbaum conducted a general neurological exam and found, in addition to the carpal tunnel diagnosis, claimant also had cubital tunnel syndrome and neuropathy.

Claimant resigned from his job with respondent on June 6, 2014, because respondent was not able to accommodate the recommendation by Dr. Baig that claimant be given an eight hour a day desk job. This recommendation stemmed from Dr. Baig's diagnosis of high blood pressure and stress. Claimant's last day of actual work was May 14, 2014. He then went on FMLA for non-work-related issues and resigned effective June 6, 2014. Claimant informed respondent of his bilateral carpal tunnel and cubital tunnel diagnoses on June 9, 2014, indicating they might be work-related. Claimant was given workers compensation paperwork to fill out, which he did on June 11, 2014, and then he heard nothing else.

Dottie Cardoza, claimant's wife, testified she was present when claimant was filling out an incident report for his back injury and how the person they were speaking with told claimant what he could and could not put on the report. She testified the nurse told claimant to write that he was not hurt at work.

On July 2, 2014, claimant reported to Dr. Shi that his symptoms improved some with the Neurontin. Dr. Shi assessed claimant with peripheral neuropathy, carpal tunnel syndrome on both sides, osteoarthritis, degenerative arthritis of the spine, memory loss, sleep deprivation and gout. Claimant was instructed to continue with the Neurontin, which

was increased and to continue with the wrist splints that were provided. Dr. Shi also ordered neurobehavorial and cognitive function tests.

Claimant met with Dr. Shi for several followup visits, with the last being on March 23, 2015. At this visit, claimant reported continued improvement of his symptoms. He was instructed to continue with his treatment and return for follow-up in two months.

Claimant met with Edward Prostic, M.D., on May 26, 2015. Claimant had complaints of episodic numbness in his fingers and intermittent soreness in his elbows. Claimant reported the use of wrist splits day and night.

Dr. Prostic examined claimant and opined that, from repetitious minor trauma during his employment with respondent, claimant developed bilateral carpal tunnel and cubital tunnel syndrome. He recommended surgery to the left upper extremity and, if there is a good result, surgery to the right upper extremity. He opined the repetitive minor trauma through June 6, 2014, with respondent was the prevailing factor in causing the injury, the medical condition and the need for medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-508(e) states:

> (e) "Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
> "Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant suffered several injuries while working for respondent. The only claim being considered in this instance involves bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Claimant testified to having symptoms for some time before terminating his employment with respondent. He advised Dr. Shi his symptoms existed for a year, with a recent worsening. However, when claimant quit his job with respondent, it was due to other, non-work causes, involving high blood pressure and stress.

In order to determine whether notice was timely provided, the appropriate date of accident must first be determined. In this instance, there is no indication claimant sought medical treatment for his bilateral carpal tunnel syndrome or bilateral cubital tunnel syndrome while he was working for respondent. Therefore, the date of accident would be the last day claimant worked for respondent, which was May 14, 2014.

For an employee no longer working for a respondent, notice is required within 10 calendar days of the last day of actual work for the employer. In this instance, that would be May 24, 2014, as noted by the ALJ. Claimant did not notify respondent of a claim for his bilateral diagnoses until June 6, 2014, after the EMG tests on June 5, 2014, well beyond the 10-day limit provided by the statute. The denial of benefits by the ALJ due to claimant's failure to provide timely notice of the claim to respondent is affirmed. While this is a harsh result, the Board is bound by the constrictions of K.S.A. 44-508 and K.S.A. 44-520.

Claimant contends K.S.A. 2013 Supp. 44-520 is unconstitutional for several reasons. The Board has consistently held that, as it is not a court established pursuant to Article III of the Kansas Constitution, it does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Accordingly, the Board will interpret and enforce the provisions of K.S.A. 2013 Supp. 44-520 as enacted.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to satisfy his burden of proving he provided timely notice of his alleged injuries.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated July 16, 2015, is affirmed.

[1] K.S.A. 2014 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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William G. Belden, Administrative Law Judge